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No. 83-1587

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

NAARTEX CONSULTING CORPORATION,

Petitioner,

v.

WILLIAM J. CLARK, SECRETARY OF THE INTERIOR, et al,

Respondents.

On petition for a Writ of Certiorari
To The United States Court of Appeals
For the District of Columbia Circuit

BRIEF OF FRED L. ENGLE d/b/a RESOURCE SERVICE COMPANY IN OPPOSITION

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QUESTION PRESENTED

Should the Supreme Court of the United States grant certiorari to review a case involving a challenge to the issuance of a single federal oil and gas lease brought more than four years after the award of that lease, where petitioner does not challenge the conclusions of the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia that the action should be dismissed for lack of personal jurisdiction and improper venue, and the Court of Appeals held the District Court did not abuse its discretion in refusing to transfer the case to another jurisdiction and to allow Russell Huff to intervene because intervention would have been futile?

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CITATIONS TO DECISIONS BELOW

The United States oil and gas lease involved in this action has been the subject of a series of administrative and judicial decisions. On February 6, 1979, the Wyoming State Office of the Bureau of Land Management of the United States Department of Interior (hereinafter "Wyoming BLM") denied Geosearch, Inc.'s protest to the issuance of this lease. By order dated May 6, 1979, the United States Department of Interior Office of Hearings and Appeals, Interior Board of Land Appeals (hereinafter "IBLA"), dismissed Geosearch's appeal because Geosearch failed to file a statement of the reasons as required by regulations.

The subsequent protest of Naartex Consulting Corporation was denied

by the Wyoming BLM on September 28, 1979, and Naartex's appeal was dismissed by the IBLA in Naartex Consulting Corp., 48 IBLA 166 (June 9, 1980).

The decision of the United States District Court for the District of Columbia dismissing Naartex's complaint is reported as Naartex Consulting Corp. v. Watt, 542 F.Supp. 1196 (D.D.C. 1982).

The decision affirming the dismissal of Naartex's complaint is reported as Naartex Consulting Corp. v. Watt, 722 F.2d 779 (D.C.Cir. 1983).

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. §1391(b) (1976)

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants

reside, or in which the claim arose, except as otherwise provided by law.

30 U.S.C. §184(h)(1) (1976)

(h) Cancellation, forfeiture, or disposal of interests for violation; bona fide purchasers and other valid interests; sale by Secretary; record of proceedings. (1) If any interest in any lease is owned, or controlled, directly or indirectly, by means of stock or otherwise, in violation of any of the provisions of this Act, the lease may be canceled, or the interest so owned may be forfeited, or the person so owning or controlling the interest may be compelled to dispose of the interest, in any appropriate proceeding instituted by the Attorney General. Such a proceeding shall be instituted in the United States district court for the district in which the

leased property or some part thereof is located or in which the defendant may be found.

30 U.S.C. §226(c) (1976)

(c) Lands not within geologic structure of a producing oil or gas field; first qualified applicant. If the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding. Such leases shall be conditioned upon the payment by the lessee of a royalty of 12-1/2 per centum in amount or value of the production removed or sold from the lease.

43 C.F.R. §4.410 (1983)

(a) Any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management or of an administrative law judge shall have a right to appeal to the Board, except--

(1) As otherwise provided in Group 2400 of Chapter II of this title.

(2) To the extent that decisions of Bureau of Land Management officers must first be appealed to an administrative law judge under §4.470 and Part 4100 of this title.

(3) Where a decision has been approved by the Secretary, and

(4) As provided in paragraph (b) of this section.

(b) For decisions rendered by Departmental officials relating to land

selections under the Alaska Native Claims Settlement Act, as amended, any party who claims a property interest in land affected by the decision, an agency of the Federal Government or a regional corporation shall have a right to appeal to the Board.

43 C.F.R. §4.411 (1983)

(a) A person who wishes to appeal to the Board must file in the office of the officer who made the decision (not the Board) a notice that he wishes to appeal. The notice of appeal must give the serial number or other identification of the case and must be transmitted in time to be filed in the office where it is required to be filed within 30 days after the person taking the appeal is served with the decision from which he is appealing, or it publication of the

decision in the Federal Register is made, within 30 days after publication of the decision in the Federal Register, whichever shall occur first. The notice of appeal may include a statement of the reasons for the appeal, a statement of standing if required by §4.412(b), and any arguments the appellant wishes to make.

(b) No extension of time will be granted for filing the notice of appeal. If a notice of appeal is filed after the grace period provided in §4.401(a), the notice of appeal will not be considered and the case will be closed by the officer from whose decision the appeal is taken. If the notice of appeal is filed during the grace period provided in §4.401(a) and the delay in filing is not waived, as provided in that section, the

notice of appeal will not be considered and the appeal will be dismissed by the Board.

43 C.F.R. §3112.2-3 (1983)

Compliance with Subpart 3102 of this title is required. The applicant shall set forth on the lease application, or on a separate accompanying sheet, the names of all other parties who hold an interest (as defined in §3000.0-5(k) of this title) in the application, or the lease, if issued. Submission of a qualifications file number alone shall not meet this reouirement, except for offers filed under §3112.6-1(b)(iii) of this title.

STATEMENT OF THE CASE

Norbert Albrecht won a lease lottery during March, 1975. The lottery was conducted by the Wyoming State Office of the Bureau of Land Management (hereinafter "Wyoming BLM") under authority granted by the Mineral Leasing Act of 1920, 30 U.S.C. §181 et seq. The details of the so-called simultaneous oil and gas lease filing system are not important to the decision whether to deny or grant certiorari. In summary form, the leasing system works like this.

Lands not within any known geological structure of a producing oil or gas field and which are owned by the United States may be leased on a non-competitive bid basis to the first qualified applicant. Rather than maintaining a "race to the land office" system, the

Secretary of Interior designates a period of time to receive applications for a given lease parcel. All applications received during the designated time are treated as simultaneously filed, and a drawing determines the first three qualified applicants. If the first entry drawn is qualified to hold a lease, the lease is issued and the other applications are rejected. If the first drawee is not qualified, the lease goes to the second drawee if qualified, or to the third drawee. If none of the first three drawees is qualified, the Secretary may conduct another lottery for the leased parcel.

Applications must be made on a standard Drawing Entry Card ("DEC"). No person may have any interest in more than one application for a particular parcel,

43 C.F.R. §3112.2-1(f). Lease applications must disclose all parties who hold any interest in the application, 43 C.F.R. §3112.2-3.[1]

Mr. Albrecht did not prepare and enter his own DEC. Rather, like many drawing entrants, Mr. Albrecht retained a filing service to assist him. Filing services are a familiar adjunct to the oil and gas leasing program, and perform a very useful function. Without leasing services, most ordinary citizens would be unable to participate in the lotteries, and the lotteries would be dominated by sophisticated and wealthy entrants.

Mr. Albrecht used the services of Fred L. Engle d/b/a Resource Service

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[1]For a more comprehensive treatment of the simultaneous oil and gas leasing program, see Lowey v. Watt, 684 F.2d 957, 960 (D.C. Cir. 1982).

Company (hereinafter "RSC"). RSC is an established filing service, having entered the business in 1973. During 1975 (the time relevant to this case) RSC did business by entering into written standard service agreements with clients. The standard service agreement obligated RSC to prepare and file DEC's on behalf of the client and also contained a brokerage provision. RSC agreed to act as the broker to market any lease won by the client for a period of five years. For its efforts, RSC was entitled to a fixed percentage of the sales price of the lease, including a percentage of any overriding royalty interest retained. RSC's brokerage was exclusive in a limited sense: RSC was entitled to the same percentage of the sales price of the lease during the five year period even if

the client sold the lease without RSC's assistance. The client retained the right to approve the sales price or to refuse to sell at all.

Mr. Albrecht was awarded his lease on June 1, 1975. Later in 1975, he assigned 100% title interest to J. S. Harrell. There were subsequent assignments of various rights in the lease. The lands under the lease were developed for oil and production began during 1977.

Also during 1977, RSC became embroiled in numerous challenges to the issuance of leases to RSC clients. Most of these protests were initiated by Geosearch, Inc., a New York corporation related to Naartex. In each case, Geosearch purchased the rights of a disappointed second or third drawee in a lease

lottery won by an RSC client and commenced proceedings seeking to have the lease awarded to Geosearch. The basis for the proceedings in each case was Geosearch's claim that the RSC exclusive brokerage provision violated regulations. The history of these protests, the Amendment and Disclaimer arrangement which cured any regulatory violations, and the eventual vindication of RSC and its innocent applicant clients is discussed in detail in Lowey v. Watt, 684 F.2d 957, 961-965, 971 (D.C.Cir. 1982).

During January, 1979, almost four years after the issuance of Albrecht's lease, Alvin Abrams as president of Geosearch filed a protest to the issuance. Geosearch's protest was on behalf of itself and all disappointed entrants in the drawing for Albrecht's

lease. Unlike its other efforts, this time Geosearch did not first buy up the rights of any specific drawing entrant but instead claimed some sort of a representative action without having any stake itself. Geosearch's appeal from the denial of the protest was dismissed by the IBLA on May 6, 1979 on the grounds that Geosearch failed to file a statement of reasons for the appeal as required by regulations.

Months later, Alvin Abrams, this time as president of Naartex, a New York corporation with the same address as Geosearch, filed another protest under a scheme no doubt intended to avoid the res judicata effect of the earlier unappealed IBLA dismissal. Abrams still had not bought an interest of a second drawee, but instead had recruited an undrawn,

unsuccessful lottery applicant for Albrecht's lease, Russell Huff, and struck a deal. Huff assigned his interest in his undrawn DEC to Naartex in return for Naartex's promise to share a percentage of any proceeds from the lease application with Huff. Armed with this assignment, Naartex started the proceedings below.

First, Naartex protested on its own behalf (not Huff's) the issuance of Albrecht's lease. The protest was denied by the Wyoming BLM on September 28, 1979. Naartex appealed, again on its own behalf, to the IBLA, and the IBLA dismissed the appeal on June 9, 1980. On July 6, 1981, thirteen months later, Naartex filed a voluminous complaint in the United States District Court for the District of Columbia, naming an array of defendants.

After the defendants filed motions to dismiss and a motion for judgment on the pleadings, Naartex sought and was granted leave to file an amended complaint on October 30, 1981. After the amendment, the defendants again filed motions to dismiss and a motion for judgment on the pleadings. Naartex then sought leave for Russell Huff to intervene as a party plaintiff and leave to file a second amended complaint adding Huff as a party plaintiff. The District Court entered its order on June 21, 1982, granting the motions to dismiss and motion for judgment on the pleadings and denying Naartex's belated motions.

The Court of Appeals affirmed, holding that the District Court lacked personal jurisdiction, that venue was

improper, and that the District Court did not abuse its discretion in refusing to transfer the case.

SUMMARY OF ARGUMENT

This case fits none of the published criteria for review on certiorari. There is no conflict between the Courts of Appeals which have reached the issues involved here, no important question of federal law has been decided, and no federal question has been decided in a way that conflicts with applicable decisions of this Court.

The Court of Appeals decision herein, based on lack of personal jurisdiction, improper venue and the futility of transfer, is in accordance with well-established law in these procedural areas and needs no review by this Court.

ARGUMENT

I. THIS CASE DOES NOT FIT WITHIN THE PUBLISHED CRITERIA FOR THE GRANT OF CERTIORARI.

Rule 17 of the Rules of the Supreme Court of the United States describes the considerations governing review on certiorari. None of those criteria are implicated here.

There is no split among the Courts of Appeals that have reached the issues in this case. This is a case about personal jurisdiction, venue and the discretion of the District Court in refusing to transfer a cause. The personal jurisdiction question raised in this case involved the "minimum contacts" between the defendants and the forum. The District Court looked to the complaints filed by Naartex and found the jurisdictional allegations insufficient.

Naartex failed to correct the shortcomings of its pleadings even after obtaining leave to file an amended complaint after these jurisdictional shortcomings were pointed out by defendants' motions to dismiss and motion for judgment on the pleadings.

The venue question was similarly simple. Given the many different states of citizenship or residence represented among the numerous defendants, venue would lie where the cause of action arose. The Courts below again relied on the pleadings to determine that wherever the cause of action arose, it certainly did not arise in the District of Columbia.

The inquiry about whether the District Court abused its discretion in refusing to transfer the cause was resolved on two legal conclusions. The

Courts below held that a District Court has no obligation to transfer a cause where transfer would be futile, and that, for a variety of reasons, transfer of this cause would be futile.

Thus, all three of the grounds for dismissing Naartex's action involved only the application of well-established procedural rules. Naartex has not even attempted to show that there is some split among the circuits.

Nor have the Courts below decided some important question of federal law. The legal rules regarding personal jurisdiction, venue and transfer are well-settled, procedural matters.

Naartex misstates facts in trying to make this case into one requiring this Court's review. For instance, at pages 39 and 40 of the Petition,

Naartex claims the government is losing millions of dollars in uncollected royalties. This is false because the governments' rights to royalties attach to a lease no matter who holds the lease. 30 U.S.C. § 226(c) (1976).

As the following sections will show, this procedural decision does not conflict with applicable decisions of this Court, but rather is supported by decisions of this Court and other courts.

II. THE DECISION OF THE COURT OF APPEALS BELOW NOT ONLY DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES, BUT ALSO IS SUPPORTED BY DECISIONS OF THIS COURT AND WELL-ESTABLISHED LEGAL PRINCIPLES.

A. The Court Of Appeals Was Correct In Affirming The District Court's Finding Of A Lack Of Personal Jurisdiction.

Decisions of this Court leave no doubt that the proper inquiry in determining personal jurisdiction places

the burden on the plaintiff to show that the defendant had sufficient contacts with the forum. None of the defendants, except possibly the Secretary of Interior, is a resident of the District of Columbia, so the possible bases for personal jurisdiction are established by the District of Columbia "long-arm" statute. Both the District Court and the Court of Appeals considered the statute and all of Naartex's proffered bases for personal jurisdiction. Naartex apparently concedes the correctness of this holding, because nowhere in its Petition for Certiorari does Naartex take issue with the determination that personal jurisdiction was lacking.

B. Venue Was Improper.

The Court of Appeals held that venue in this case, pursuant to 28 U.S.C.

§1391(b), could only be in the judicial district where all defendants resided or in which the claim arose. There is no district where all defendants reside. The Court of Appeal also held that the claim did not arise in the District of Columbia. Again, this holding is so clearly correct that even Naartex does not question it in the Petition for Certiorari. Naartex's pleadings show that none of the alleged regulatory violations or "fraudulent" filings took place in the District.

C. The Courts Below Did Not Err In Denying The Motion To Transfer.

Naartex's whole quarrel with the decisions below must therefore be with the decision that the District Court did not abuse its discretion in refusing to transfer the case. The Courts below

held that transfer would be futile, and that holding is correct.

The key to the transfer holding is that Naartex failed to show that any of its claims could properly be heard in any federal court. The substantive defects of Naartex's claim are summarized below.

1. The Mineral Leasing Act of 1920 does not create an implied private right of action.

Naartex's claim that the Mineral Leasing Act of 1920 gives it a private right of action is wrong. Two United States Courts of Appeals have decided the issue, and both have held that the Mineral Leasing Act does not create a private right of action. The United States Court of Appeals for the District of Columbia Circuit did so in this case, and the

United States Court of Appeals for the Tenth Circuit did so in Pullman v. Chorney, 712 F.2d 447 (10th Cir. 1983). In Pullman, the plaintiff brought a civil action, claiming that defendants had obtained leases by violating regulations. Pullman relied on an implied right of action for these regulatory violations. The Court reasoned as follows:

> Mr. Pullman apparently relies on an implied cause of action. However, a mere proscription of behavior does not justify an inference of a private cause of action for its violation; instead, there must be some evidence that Congress intended one. Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11, 100 S.Ct. 242, 62 L.Ed. 2d 146 (1979). Although section 226-2[30 U.S.C. §226-2 (1976)] implies that Congress intended to allow private litigants to seek cancellation of leases awarded by the Secretary, nothing in the legislative history suggests that Congress intended to provide

> them anything beyond this narrow remedy. In fact, the Act itself implies that there should be no further private remedy since 30 U.S.C. §184(h)(1)(1976) authorizes the Attorney General to bring an action for the forfeiture of any lease acquired in violation of the act. See Kissinger v. Reporters Committee For Freedom Of The Press, 445 U.S. 136, 149, ("[I]t is 'an elemental cannon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it' "). Since we find no reason to read other remedies into this act - which was enacted to benefit the public by stimulating mineral development, not to protect drawees in oil lotteries - we decline to do so. Mr. Pullman has no private cause of action besides his claim for an order that the Secretary cancel the leases involved in this suit, which we have already determined was properly dismissed.

712 F.2d at 449-450. Since the only two Courts of Appeals to decide the issue

have both held that there is no such private right of action, there is no reason to grant certiorari to review the question.

2. Naartex failed to plead a claim for common law fraud.

Based on Naartex's own statements that it was relying on the existence of a private right of action under the Mineral Leasing Act, the District Court did not extensively treat the question of whether there can be a common law fraud action for regulatory violations. The Court of Appeals held that Naartex failed to plead the common law fraud with necessary particularity and that even if Naartex had, there was no federal subject matter jurisdiction.

Rule 9(b) of the Federal Rules Of Civil Procedure require the circum-

stances constituting fraud to be pleaded with particularity. The Court of Appeals held that Naartex had failed in this respect and in its Petition for Certiorari Naartex once again fails to point to any particularized allegations. The holding of the Court of Appeals is thus not challenged by Naartex.

However, even if Naartex had challenged that holding, there is another basis to support the Court of Appeals decision. No federal court may maintain a claim unless it has subject matter jurisdiction granted by statute. Victory Carriers Inc. v. Law, 404 U.S. 202, 212 (1971). In its pleadings, Naartex relied on federal question jurisdiction to support its claim for a private right of action arising under the Mineral Leasing Act of 1920 and stated no separate basis

for subject matter jurisdiction for its common law fraud claim. Whether or not the fraud claim could be pendent or ancillary to the Mineral Leasing Act claim is moot, because there is no Mineral Leasing Act claim. Unless the fraud claim has a separate jurisdictional basis, it must be dismissed.

The Court of Appeals held that the complaint failed to plead diversity jurisdiction and failed to plead facts from which diversity jurisdiction could be inferred. In particular, Naartex failed to plead the citizenship of the parties and there is no doubt that a plaintiff has the burden of pleading the requisite elements of subject matter jurisdiction. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936);

5 C. Wright & A. Miller Federal Practice and Procedure §§ 1206, 1208 (1969).

Again, Naartex has not challenged this determination in its Petition for Certiorari. This Court should not grant certiorari to review a well-settled proposition of the law of federal subject matter jurisdiction.

3. Naartex lacks standing to pursue any claim to Albrecht's lease because of the federal Anti-Assignment Acts.

Naartex is in a business that violates the federal laws regarding assignments of claims against the government. Naartex buys up the "rights" (however remote or speculative) of disappointed lottery entrants for the express purpose of bringing administrative and judicial proceedings against the government. The federal Anti-Assignment laws,

31 U.S.C. §3727 (1983) and 41 U.S.C. §15 (1976) forbid this. 31 U.S.C. §3727 does permit transfer or assignment of a claim against the United States after the claim is allowed, the amount of the claim determined and a warrant for payment issued, but even in those circumstances there are procedural requirements of the assignment which have not been complied with here. Naartex's assignment violates the Anti-Assignment Acts and this Court should not grant certiorari to review a clear application of clear statutes.

4. There was no error in denying Huff leave to intervene as a plaintiff, because intervention would not have cured the defects of Naartex's claims.

Huff could not have breathed new life into the claims against the government, because Huff did not participate in the administrative proceedings.

Naartex alone brought the protest, the IBLA appeal and the civil action in the district court. At a minimum, Huff may not now challenge the issuance of Albrecht's lease because he did not make a timely challenge to the issuance of the lease under IBLA regulations appearing at 43 C.F.R. §4.410 and 4.411. Only after an IBLA appeal has been decided is the Secretary's decision to issue the lease "final" and subject to judicial review. See Pullman v. Chorney, 712 F.2d 447, 449 (10th Cir. 1983). Huff has not exhausted any administrative remedies and is well beyond the deadlines for doing so.

Intervention by Huff would not change the lack of any private right of action under the Mineral Leasing Act, Naartex's failure to plead a common law fraud action, the lack of subject matter

jurisdiction for such an action, the lack of personal jurisdiction and improper venue of this action.

For these reasons, there was no error in refusing to allow Huff to join the action. The action had to be dismissed with or without him.

CONCLUSION

There are no substantial federal interests at stake in this procedural case. The Courts of Appeals are in accord, and there has been no deviation from applicable decisions of this Court. The petition for grant of certiorari should be denied for all the foregoing reasons.

Dated this ___ day of April, 1984.

Respectfully submitted,

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